53116

NILES CONSTRUCTION CO., a corporation, Plaintiff-Appellee vs. LA SALLE NATIONAL BANK, as Trustee under Trust #30680, et al Defendants LARS S. GOSELL and DOROTHY GOSELL, Defendants-Appellants	APPEAL FROM CIRCUIT COURT COOK COUNTY Honorable James L. Henry Magistrate Presiding

MR. JUSTICE SMITH DELIVERED THE OPINION OF THIS COURT:

This is a suit by the plaintiff, a cement contractor, to foreclose a mechanics' lien for the value of labor and materials furnished by it on various lots in the same subdivision. One of the lots involved was purchased by the defendants, who filed a counterclaim for damages claiming defective workmanship and materials furnished by the plaintiff. The trial court entered a decree establishing a mechanics' lien in the amount of $4,199.51, together with interest, ordered the property sold and dismissed the counterclaim of the defendants for damages. Defendants appeal.

We need not tarry long with the counterclaim. There is a direct conflict in the evidence and the determination of which of the architects and parties told the truth rests primarily with the trial court. It has been repeatedly held that a reviewing court will not substitute its judgment for the credibility of witnesses unless the findings of the trial court are against the manifest weight of the evidence. Brown v. Zimmerman, 18 Ill.2d 94, 163 N.E.2d 518. One of the defendants' own experts testified on cross-examination that it was not necessary to do all of the work which went to make up his "estimate" in order to have a good and workmanlike job as those terms are understood by the construction trade. There is ample evidence, if believed by the

court, to support the dismissal of the counterclaim and it is affirmed. The court did allow $600.00 as a setoff.

In May, 1964, the defendants, Lars Gosell and his wife, contracted with Signet Homes, Inc. for the construction and purchase of a home in a subdivision. The contract specifically provided that the seller would "construct such residence in a neat and workmanlike manner within a reasonable time" and further provided that "all construction work to be performed by seller shall be done in accordance with the rules and regulations of Cook County, Illinois". The seller in this instance was Signet Homes, Inc. and it was developing a subdivision. The construction was completed, the Gosells paid Signet Homes, Inc. and moved in in October, 1964. For some reason not shown by the record, they did not receive a deed until September, 1965. This deed was not dated so a new one was obtained, dated and recorded in December, 1965. In the meantime, in August, 1965, the instant suit was filed by the plaintiff to establish his lien on this property or about a month before any deed of the purchaser was placed on record. The Gosells were not made parties to this suit until April, 1967.

The plaintiff testified that the last work performed by his company on this particular lot was on November 9, 1964, which would be about a month after the defendants actually took possession. He further testified that Signet Homes, Inc. was the general contractor and that Niles Construction Company was not involved in any phase of the construction other than the cement work. The record further shows that the plaintiff contracted with Signet Homes, Inc. for the performance of this particular work; that there was no contractural relationship between the plaintiff and the Gosells and that when the Gosells complained about any of the construction work during construction, they made their complaints to the foreman of Signet Homes, Inc. It would thus seem to be clear from this record that Signet Homes, Inc. is a vendor-builder. In March, 1964, it entered into a contract with the plaintiff to do the concrete work on several lots in

this subdivision. At this point, the defendants, Gosell and his wife, were not in the picture and did not enter the picture until May, 1964. In October, 1964, the Gosells moved in, made settlement with Signet Homes, Inc. and received and recorded their deed in December, 1965.

In the final determination of this case, it becomes important to determine whether the plaintiff is a contractor or a subcontractor and whether the defendants, the Gosells, are owners or subsequent purchasers. The status of the parties is of importance in determining which section of the Mechanics' Liens Act applies. Ill. Rev. Stat. 1967, ch. 82, § 1, et seq. It is, of course, fundamental that the burden of proving every fact required by the Mechanics' Liens Act to establish a right to a lien against the premises rests on the one asserting it. 26 I.L.P. Mechanics' Liens, § 212, p. 427. In North Side Sash and Door Co. v. Hecht, 295 Ill. 515, 129 N.E. 273, and in Anderson v. Gousset, 60 Ill. App. 2d 309, 208 N.E.2d 37, it was held that the time fixed for commencing an action under the Mechanics' Liens Act is a condition of liability itself and not of the remedy alone. The provisions of the statute creating the lien requiring the suit to be filed within a specific period is more than an ordinary statute of limitations and goes to the existence of the right itself.

Notwithstanding the fact the Gosells went into possession in October, 1964, no notice of any kind was served on them claiming a lien on the property. When the suit was filed in August, 1965, they were not made parties either by name or by designation as "unknown owners". They were not made parties until April, 1967. In short, none of the steps required to perfect a lien against them as owners were taken within the two years. Notwithstanding the testimony of plaintiff's president that his company regarded itself as a subcontractor it at no time complied with § 24 of the Act, Ill. Rev. Stat. 1967, ch. 82, as to notice and did not treat the Gosells as owners in the suit or by way of notice until they were

made parties to the suit in April, 1967. By that time, any right under § 24 by the plaintiff as subcontractor against the Gosells as owners had expired. No sixty day notice was ever given. Hence, under that section and with the relationship of subcontractor-owner, no lien was established.

It is apparent that the Gosells could not have been regarded by the plaintiff as owners in March, 1964, where the undisputed testimony is that they had no connection with this transaction until May, 1964. Plaintiff had no contract with them and no agreement with them. Plaintiff's contract was with Signet Homes, Inc. and in like manner the Gosells' contracts and agreements were with Signet Homes, Inc. It would seem, therefore, to be evident from this record that the Gosells are "purchasers" within the meaning of § 7 of the Act. When the instant suit was filed, the Gosells were not even mentioned. It is therefore apparent that at the time of the contract, at the time the work was performed, and at the time this suit was commenced, the plaintiff treated Signet Homes, Inc. as "owner" of the property in question. Section 7 provides a two-year time limit for the enforcement of a lien against the owner and the filing of the instant suit in August, 1965, was sufficient compliance so far as it applies to Signet Homes, Inc. That same section, however, states "no contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser" unless a suit is brought to enforce the lien or there is filed in the office of the recorder of deeds in the county a claim for lien. No suit was filed within four months nor was a claim for lien filed in the recorder's office.

However, plaintiff contends that in reality, the Gosells bought this property while this suit was pending. They arrived at this conclusion from the fact that deed #1 was delivered in September, 1965, and corrected deed #2 in December, 1965, and at that time this suit had been pending since August.

Citing Weber v. Kemper, 320 Ill. 11, 150 N.E. 339, the plaintiff states that where a party buys property which is subject to litigation from a party to the action after process has been served and while that action is pending, he will be bound by whatever decree may be finally entered in the suit in regard to the property. By purchasing pendente lite he makes himself a party to the suit although he is not a party of record and his interests are represented by the party from whom he purchased in the litigation. The difficulty with the plaintiff's position is that in Joiner v. Duncan, 174 Ill. 252, 257, 51 N.E. 323, 325, it was stated:

> "Actual possession of land is notice equal to the record of a deed under which the party in posssession claims, and a purchaser is bound to inquire by what right or title the party in possession holds, and he will take subject to that title, whatever it may be."

Inquiry would have established the fact that the Gosells were contract purchasers from Signet Homes, Inc and as such were the equitable owners of the property. The last work done on this particular lot was in November, 1964. Therefore, whether the Gosells are considered "subsequent purchasers" or owners, there has been no compliance with § 7 of the Mechanics' Liens Act, which would give this plaintiff a lien in either category. No claim for lien was filed within four months, no suit was filed within four months, and no suit was filed within two years after completion of the work on this lot. It is urged, however, that since work was done on some of the other lots in the subdivision within two years of this suit that compliance with the two-year requirement is thus met. Disposition of the plaintiff's assertion in our judgment is taken care of in Malicki v. Holiday Hills, Inc., 30 Ill. App. 2d 459, 174 N.E.2d 915, and is controlling here. It was pointed out in that suit that if the statute can be construed to permit a suit against the owner within two years after the last work is completed on any lot in a subdivision that such lien might well be available for a period of five, ten or fifteen years and such is not the plain intendment of the statute.

The fact that the Gosells recorded their deed after this suit was filed does not make them purchasers pendente lite within the meaning of Ill. Rev. Stat. 1967, ch. 22, § 53, as that Act does not apply to a party in possession. The interest of the Gosells in this property was acquired prior to the filing of any suit and prior to the filing of the lis pendens notice. There was no compliance with Ill. Rev. Stat. 1967, ch. 30, § 121. The recording of the Gosells' deed was actually only the completion of their contract with Signet Homes, Inc. and their interest in the property was acquired in May, 1964. Under the circumstances related in this record, it therefore appears to us that the plaintiff has not established its right to a lien on this property undereither § 7 or § 24 of the Act, and the decree of the trial court foreclosing the lien is in error and should be and it is hereby reversed.

Affirmed in part; reversed in part.

Trapp, P.J. and Craven, J. concur.

119 I.A. 2nd 85
No. 69-94

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
ROBERT E. COOKSEY,
Defendant-Appellant.

Appeal from the Circuit Court of the 18th Judicial Circuit, Magistrate Division.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

After a bench trial, defendant, Robert E. Cooksey, was found guilty of driving a motor vehicle while under the influence of intoxicating liquor in violation of Section 47 of the U.A.R.T. (Ill. Rev. Stat. 1967, Ch. 95½, Sec. 144). He appeals from the judgment under which he was sentenced to ten days in the county jail.

The sole question is whether the defendant was proven guilty beyond a reasonable doubt.

The arresting officer testified, that on November 17th, 1968, at about 3:30 A.M., he observed defendant's car as it made a right turn in Bensenville. It went up on the curb with both wheels being on the corner, and then to the opposite side of the road, across the dividing line; then straightened out and stopped. As the car then proceeded down the street it was being driven in an "erratic" manner, back from the curb across the center line and back to the curb. The officer put the spotlight on the vehicle and went over

to the defendant's car, asking to see his driver's license. The defendant informed the officer that he didn't have one, after some fumbling around. At that point the officer told defendant he was under arrest and asked him to get out of the car.

Defendant made several efforts to adjust his clothing and then when he stepped out he almost fell. He was staggering. His clothes were mussed up and rumpled, his hair was disarranged, his shirt was rumpled and his pants weren't fastened completely. Also, there was a very strong odor of alcohol about his person. There was a lady in the car and she appeared to be intoxicated. At the station, the officer testified, he asked defendant if he would take a breathalizer test and defendant said "I just had a 47 and I know better than to take tests".

Relating the observation of some five to seven hundred persons under the influence of intoxicating liquors in the officer's nine years on the force, he gave his opinion that the defendant was under the influence of intoxicating liquor. He also said that defendant's speech was slurred and he was having a hard time talking.

Defendant testified that on November 16th, 1968, he was suffering from vomiting, dysentery, high temperature, and didn't go to work that day; that he took some medicine and fell asleep, but woke up at 10:30 or 11:00 o'clock that evening feeling better, and decided to go out and eat; he drove to an eating place where he had a steak dinner and two or three small bottles of beer at about 1:00 or 1:30 A.M. After dinner, he again became ill, vomited, had a fever and was dizzy. He went outside and sat in his car for a while, and as the restaurant was closing he recognized a woman who lived near him and offered to give her a ride home. He said that he was not familiar with the roads in the area, having

moved to Bensenville only two months previously, and that he "got lost". Recognizing a shopping center, he realized that he was proceeding in the wrong direction and had to turn around, and in turning two of his wheels ran over a low curb which he didn't know existed. It was at this time that the officer appeared. He testified that he told the officer that he had a license, but it was due to be revoked in the near future, and the officer then said that he was taking him to the police station for further investigation, but at no time did he say anything to defendant about drinking. Defendant said that he stood by the officer's desk for 15 or 20 minutes and had no trouble standing while the officers checked with Springfield and received a report that defendant's license was due to be revoked. It was at this point that the officers wrote out the ticket, and he had not previously been informed that he was under arrest.

Defendant testified that at no time was he asked to take a breathalizer test and that there were no tests at any time given to him to test his sobriety.

No other witness testified.

Defendant agrees that a trial judge's findings on conflicting evidence, which involves the credibility of witnesses, are entitled to considerable weight on appeal, but contends that the proof is so unsatisfactory as to raise reasonable doubt of the defendant's guilt, under the authority of People v. Mundorf, 85 Ill. App. 2d 244 (1967).

In Mundorf there was testimony of the officer that he based his opinion of intoxication on observation of odor, bloodshot eyes, talkativeness, and lack of balance. He observed the defendant taking an ulcer medication. The officer's testimony was contradicted at key points by defendant and a passenger. They testified

that defendant had had nothing alcoholic, that defendant had recently been hospitalized for an ulcer and liver ailment and prohibited from drinking. It was uncontroverted that defendant was permitted to drive his car from the station as soon as the complaint was issued; and that defendant could not have had bloodshot "eyes", since one eye was glass.

The facts in Mundorf distinguish the cases. Here, defendant was not corroborated. There was no impeachment of the State's testimony by any independent witness, or by circumstances such as the permission to drive the car and the impossibility of an eye of glass being bloodshot. In the case at bar, there was substantially more observation by the arresting officers, upon which to base their opinion of intoxication than in Mundorf. While defendant argues that some objective tests should have been given, the reference is to a conflict in the evidence as the arresting officer testified that he asked defendant to submit to a breathalizer test and that the defendant refused.

On the whole record it cannot be said in this case that the proof was so unsatisfactory as to raise reasonable doubt of defendant's guilt. Where the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact. The People v. Clark, 30 Ill. 2d 216, 219 (1964). See also People v. Miller, 101 Ill. App. 2d 361, 364, 365 (1968).

The evidence is sufficient to sustain the finding that the defendant was guilty of the offense charged and the judgment below is affirmed.

AFFIRMED.

DAVIS, P.J. and MORAN, J. concur.

119 I.A. 2nd 90

No. 69-63

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1970.

THEODORE HAMM BREWING CO., a Corporation, Plaintiff-Appellee, vs. FIRST TRUST & SAVINGS BANK OF KANKAKEE, a corporation, and HAROLD E. LAPE, Individually and d/b/a KEY CITY BEVERAGE COMPANY, Defendants-Appellee and Appellant.	Appeal from the Circuit Court of Kankakee County Honorable Herman W. Snow, Judge Presiding.

Abstract

ALLOY, J.

This is an appeal from an order of the Circuit Court of Kankakee County denying a motion to set aside a default judgment as against defendant, Harold E. Lape, individually and d/b/a Key City Beverage Company. The judgment was based upon a complaint filed by plaintiff, Theodore Hamm Brewing Co. charging that defendant Lape was indebted to plaintiff in the sum of $16,514.54. A motion for an order of default had been filed on July 5, 1966. An order was entered that a hearing on the default was set for September 8, 1966, but nothing was done on that particular day. On March 8, 1968, a judgment was entered against defendant Lape. There was no notice given to defendant.

The petition to vacate and set aside the default judgment stated that defendant Lape was duly adjudicated a bankrupt on June 29, 1967, and that he was discharged as a bankrupt on August 13, 1968. It was disclosed by the petition that an attorney representing defendant Lape had advised as against filing a petition in bankruptcy unless defendant Lape's wife joined in the petition. In May or June of 1967, Lape advised the attorney that he was going to file a petition in bankruptcy in the Federal District Court in Michigan. The file in his case was delivered to defendant Lape by the attorney, and Lape understood that the attorney-client relationship was thereby terminated. Lape was never thereafter advised by the attorney that a judgment had been requested to be entered against him nor did the attorney ever advise Lape that the judgment had in fact been entered against him. The petition also recited that defendant believes that plaintiff had been duly apprised of the bankruptcy and that the claim of plaintiff was duly listed in the schedule in the bankruptcy petition.

The petition also recited that defendant Lape first learned of the entry of the judgment after more than 30 days had expired from the time of entry of the judgment. He had been under the impression that the bankruptcy petition had terminated his obligation to plaintiff and did not know until advised by an attorney he consulted that the defense of bankruptcy must be pleaded. Defendant specified that he had never received any notice of the request for a default judgment nor was he ever advised by anyone that any such default would be taken. He attached to the petition a copy of his proposed answer showing a complete defense to plaintiff's claim, and requested that the court set aside and

vacate the judgment and permit him to file his answer. No counter-affidavits or motions as to defendant's petition were made by plaintiff. Plaintiff has not seen fit to file a brief in this cause on appeal.

We believe that the principles announced in the case of WOODWARD v. WOODWARD, 96 Ill. App. 2d 251, are applicable. The contentions made by the defendant are not contested. The appellee has not submitted an answering brief and this Court accordingly may reverse the judgment without further explanation of the merits of the appeal.

We believe, however, on the basis of the record submitted in this cause, that the judgment in this cause should be vacated and that defendant should be permitted to file the answer setting forth his meritorious defense to the claim of plaintiff (STEHMEN v. REICHHOLD CHEMICALS, INC., 57 Ill. App. 2d 40, 49; LYNCH v. ILLINOIS HOSPITAL SERVICES, INC., 38 Ill. App. 2d 470, 476). We note also in the case before us that the trial court acknowledged that it had no information about the bankruptcy at the time the judgment was entered.

The order of the Circuit Court of Kankakee County is, therefore, reversed and this cause is remanded to such court with directions to vacate and set aside the judgment entered in this cause as against defendant and to permit defendant to file an answer to the complaint in this cause as requested in defendant's petition.

Reversed and Remanded with Directions.

Ryan, P. J. and Stouder, J. concur.

119 I.A. 2nd 108 NO. 69-75

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

CLARENCE W. SHOEMAKER, Plaintiff-Appellant vs. RONALD EDMONDS, Defendant-Appellee	Appeal from the Fourteenth Judicial Circuit, Mercer County, Illinois. Honorable Conway Spanton Presiding Judge

RYAN, J.

Abstract

This is an appeal from an order from the Circuit Court of Mercer County which denied plaintiff's claim for attorney's fee against the defendant.

Helen L. Edmonds died January 23, 1963, leaving a will which devised all of her real estate to the defendant, Ronald Edmonds, a step-son of the decedent. The will named said defendant as executor. Since the defendant resided in Michigan, he was precluded from acting as Executor of the estate (Ill. Rev. Stats., Chapt. 3, Sec. 77). In response to a petition the court appointed the plaintiff administrator with the will annexed and he has continued to function in that capacity. Plaintiff is an attorney and also performed all of the legal services involved in the probate proceeding.

Plaintiff contends that because of hard feelings which existed between the defendant and the heirs of the decedent who were the recipients of the personal property of the estate, the defendant agreed to pay the plaintiff that part of his attorney fees for the administration of the estate which would be attributable to the real estate.

Plaintiff has received Three Hundred Fifty Dollars ($350.00) from the estate as fees for administrator and for attorney's fees. Plaintiff states that this amount is set forth in the final account which has not been approved by the court. The estate has not been closed. Plaintiff contends that the amount of attorney fees which he now claims from the defendant was not included in the amount claimed from the estate. No part of the probate proceedings has been introduced into evidence in this case. We have only the testimony of the witnesses from which to ascertain what actually transpired in probate. From this testimony it appears that the plaintiff was appointed as administrator with the will annexed; that he performed the necessary legal services in the administration of the estate; that no other attorney was employed to represent the said administrator and, that the plaintiff received Three Hundred Fifty Dollars ($350.00) as aforesaid. It further appears that no petition was presented to the court in the probate proceedings for the allowance of these fees and the same has not been approved as a charge against the estate since the final account has not been approved.

Plaintiff sent the defendant a bill for One Hundred Fifty Dollars ($150.00) for attorney's fees. The defendant sent the plaintiff a check for Ninety-eight Dollars ($98.00) claiming the difference between that sum and One Hundred Fifty Dollars ($150.00) represented a penalty that he had to pay as a result of the plaintiff's failure to pay the inheritance tax within the time prescribed. Plaintiff retaliated by increasing his demand on the defendant for attorney's fees to Two Hundred Twenty-five Dollars ($225.00) and by filing suit therefor. The trial court found for the defendant and the plaintiff has appealed.

The defendant has filed no brief in this court which fact gives this court the discretion to reverse the decision of the trial court without considering the merits or to consider the case upon its merits. Mello v. Lepisto, 77 Ill App2d 399, 222 NE2d 543. As in the Mello case, the small amount involved

undoubtedly prompted the defendant to decide against filing a brief in this court. The expense of pursuing the appeal would far exceed the amount of any judgment which could be rendered against the defendant. If the defendant were to pursue the case to this court and prevail, he would still be the loser financially. Plaintiff is not in such a disadvantageous position because as an attorney representing himself he is not put to this additional expense on appeal. We do not feel that the defendant should be put in such a "heads-you-win--tails-I-lose" position. We therefore feel that we should examine the merits of this case.

This is not the customary suit for attorney's fees in which an attorney sues for the value of services which he performed for his client. This is an action based on an alleged agreement by the defendant to pay part of an obligation of another. Prior to the Probate Act the claim for attorney fees for services performed in the administration of an estate was enforcible against the personal representative only, in his individual capacity. Under the Probate Act an attorney has a right to present a claim against the estate for such services in his own name. Ill. Rev. Stats. 1963, Chapt. 3, Sec. 337; 5 James Illinois Probate Law and Practice, Sec. 337.1 Therefore, plaintiff here is not seeking to recover attorney's fees for services which were furnished to the defendant but attorney fees for services which were furnished to the estate and which the defendant allegedly agreed to pay.

Section 337 of the Probate Act provides that the attorney shall be allowed "reasonable compensation" for his services. In the case of In re Estate of Jaysas, 33 Ill App2d, 287 at 292; 179 NE2d 411 the court said:

> "The amount to be paid to an attorney for an services rendered by him for an administrator or executor is a matter peculiarly within the province of the Probate Court . . . . This amount is to be determined by the court in the exercise of judicial discretion."

See also In re Estate of Klappa, 18 Ill App2d 501 (505), 152 NE2d 754; In re Estate of James, 10 Ill App2d 232, 134 NE2d 638; In re Estate of Gilbert, 319 Ill App 15, 19, 48 NE2d 567.

Plaintiff does not contend that the defendant agreed to pay him any stipulated amount as attorney fees but contends that the defendant agreed to pay that part of the attorney fees in the probate proceedings "which involved the real estate." Since the plaintiff is seeking to recover from the defendant a portion of the attorney's fees to which he is entitled for his work in connection with the administration of the estate, it is first necessary to have a judicial determination of what attorney fees he is entitled to in this capacity under Section 337 of the Probate Act. There has been no such determination as to what fees are reasonable for the legal services which he performed in the probate proceedings. The plaintiff is therefore in no position to prove any claim against the defendant for that part of the reasonable fees of the probate proceedings "which involved the real estate." The trial court held that the case was premature and that the fees should be determined in the probate proceedings. We are in accord with this decision.

The question of whether a person is entitled to receive fees in both the capacity of an administrator under Sec. 336 of the act and the capacity as an attorney under Sec. 337 of the act has not been raised. In view of our holding above a decision on that point is not necessary to the determination of this case.

AFFIRMED

STOUDER, P.J. concurs.

ALLOY, J. concurs.

119 I.A. 2nd 109

119 I.A. 109

No. 69 135

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

DALLAS WOOLBRIGHT, Plaintiff-Appellee, v. ARTHUR T. MC INTOSH & CO., a corporation and WOOLBRIGHT, INC., a corporation, Defendant-Appellants.	Appeal from the Circuit Court of Ogle County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from an order of the Circuit Court of Ogle County entered May 21, 1969, that granted the motion of the plaintiff for summary judgment.

On February 21, 1968, the plaintiff, Dallas Woolbright, a stockholder of Woolbright, Inc., a corporation, filed suit to set aside a certain deed executed February 1, 1965, that purported to convey property owned by the corporation to the defendant, Arthur T. McIntosh & Company. The deed was signed by Carlos Woolbright, as president, and Flaudia Woolbright, as secretary, of Woolbright, Inc. and was recorded on September 20, 1965. The amended complaint alleged that the deed was given to McIntosh to secure a personal obligation of Carlos Woolbright and that the conveyance was not made for any corporate purpose and without corporate authorization. The complaint further

alleged that McIntosh knew that the deed was "illegal and void and conveyed in fact, no title to the grantee. . ." and that the debt owed by Carlos Woolbright had been discharged in bankruptcy.

On March 6, 1968, McIntosh answered the amended complaint and denied the allegations that the deed was not made for any corporate purpose or that they were aware that the deed was void.

On June 17, 1968, McIntosh filed verified answers to interrogatories previously propounded by the plaintiff. Those answers stated that Carlos Woolbright and his wife had purchased a lot from McIntosh for $4,140.00. Carlos paid $838.00 in cash, received a deed to the lot, and gave McIntosh his note for $3,302.00 for the balance of the purchase price. Carlos also gave McIntosh the deed from Woolbright, Inc. to secure payment of the note and made "representations . . . (that) . . induced . . . (McIntosh) . . to believe that they had the expressed, implied or apparent authority to bind Woolbright, Inc. to the execution of the Warranty Deed in question."

On July 18, 1968, Dallas Woolbright moved for summary judgment supported by the affidavit of Carlos Woolbright to the effect that he had been discharged in bankruptcy pursuant to his petition filed on June 2, 1966, and that his debt to McIntosh had been included in his petition. On May 21, 1969, the trial court found that there was no genuine issue as to any material fact and that the plaintiff was entitled to a decree as a matter of law.

Subsequent to the decree but before his notice of appeal therefrom, McIntosh moved to file a third party complaint against Carlos Woolbright that was based on fraud. The appellee includes the third party complaint in his excerpts of supplemental record and maintains

in his brief that McIntosh cannot now raise the issue of fraud since it had not been raised at the trial level before the entry of the decree. We would agree with that contention but it does not appear that this appeal is based on the alleged fraud of Carlos Woolbright or that the third party complaint is properly a part of this appeal.

Section 57 of the Civil Practice Act (Ill. Rev. Stat. 1967, ch. 110, sec. 57) provides that a decree of summary judgment ". . . shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law."

A motion for summary judgment should only be granted where there is no genuine triable issue of fact to be passed upon. Harp v. Gulf, Mobile & Ohio R. Co., 66 Ill. App. 2d 33, 41. It has been described as a "drastic method of disposing of litigation" and should only be employed where it is apparent that no triable issue of fact does exist. Watkins v. Lewis, 96 Ill. App. 2d 182, 188. To determine the existence of a genuine issue of material fact it is necessary to examine the pleadings, interrogatories, affidavits and other matters included in the trial record. Anderson v. LeBeau, 97 Ill. App. 2d 170, 174.

The subsequent bankruptcy of Carlos Woolbright would itself have no bearing on the validity of the execution and delivery of the deed in question. Therefore, the affidavit filed in support of the motion is of little value in our search for a triable issue. The amended complaint, however, alleged that the conveyance was not made for any

corporate purpose and was without corporate authorization. The answer of McIntosh denied both of those allegations and in their answer to the interrogatories McIntosh maintained that Carlos Woolbright had made representations to induce a belief that he did have the authority to bind the corporation. Under these circumstances, we feel that the record does disclose the existence of a genuine issue of a material fact and that the decree was improperly entered. Therefore, we reverse that decree and remand the matter to the trial court for further proceedings.

REVERSED AND REMANDED.

DAVIS, P. J. and SEIDENFELD, J., concur.

119 I.A. 2nd 162

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11129 Agenda No. 69-94

Lena Smith,

Plaintiff-Appellant

vs.

Frank P. Smith,

Defendant-Appellee

Appeal from
Circuit Court
Vermilion County

CRAVEN, P.J., delivered the opinion of the court.

A decree of divorce was entered in this case on December 27, 1963. By the terms of that decree the defendant-husband was ordered to pay $30 per week child-support payments and such payments were ordered to be made to the Clerk of the Circuit Court. In addition the defendant was ordered to maintain a "Health and Hospitaliration" insurance policy on the children born of the marriage. The respondent made the child-support payments to the Clerk of the Circuit Court from the date of the decree until December of 1964. Thereafter until August of 1967, the child-support payments were made directly to the petitioner. As a result of a controversy between the parties payments to the Clerk as a conduit were resumed in August of 1967 and continued to January 21, 1969, the date of the hearing in the instant

proceeding.

The wife filed an amended petition for rule to show cause asserting that the defendant was in contempt of court for failure to make the child-support payments to the Clerk of the court, and further that the defendant was delinquent in certain of the child-support payments. The amended petition sought an adjudication that the defendant was in contempt of court, sought his incarceration and attorney's fees.

A hearing was held on the petition for the rule to show cause in January of 1969. The only witnesses at the hearing were the parties and only two exhibits were received, one being a bill indicating a charge for hospital or medical services for a daughter in June of 1968, in the total amount of $62, and the other being a time sheet of the attorney for the petitioner indicating charges for time devoted to the proceedings. There is conflict in the evidence and uncertainty with reference to the payment of the child support as provided in the decree. The defendant sought to stipulate that he was delinquent in his child-support payments by three weekly payments. The petitioner asserted, but did not establish, that there was a greater arrearage.

The petitioner apparently asserts that the defendant's failure to strictly comply with the decree and make all the payments to the Clerk of the Circuit Court casts upon him the burden of proving that all payments were made notwithstanding the fact

that his testimony and hers was to the effect that he stopped the payments through the office of the Circuit Clerk and made them directly to the petitioner and she accepted same. The Circuit Court ultimately determined that the defendant was in contempt for not paying three weekly child-support payments, ordered that the same be paid and gave the defendant five days to purge himself of contempt by making those payments.

As to the allegations with reference to the failure of the defendant to provide or collect on the medical or hospitalization insurance, the trial court made no specific finding but concluded that none was possible in view of the absence of competent evidence on the issue.

The notice of appeal asks that this court enter a finding that no payments were made during the years 1965, 1966 and until August 1, 1967, and that the total amount of those required payments be determined to be that which the defendant owes by reason of the original decree. The appellant's brief asserts two points: (1) That a showing that a divorced husband has failed to comply with a decree directing the payment of alimony is prima-facie evidence of contempt, and (2) that upon establishing prima-facie evidence of contempt the burden shifts to the husband to show with reasonable certainty that which would justify the failure to comply with the terms of the decree.

The appellee has filed no brief or otherwise made his appearance in this court. We have taken with the case a motion by the appellant requesting that this court, by reason of the default in appearance or brief, remand with directions to grant the appellant all the relief she seeks.

A failure by the appellee to file an appearance or brief in this court would authorize this court to reverse and remand. Such action, however, is not required and this court may examine the points raised by the appellant to see if they merit reversal of the trial-court judgment. See American Nat'l Bank & Trust Co. v. City of Chicago, 110 Ill. App. 2d 47, 249 N.E.2d 148 (1st Dist. 1969), and cases there cited. Our examination of this record and this proceeding leads us to the conclusion that a summary reversal of the trial-court proceeding would be inequitable and unwarranted in view of the record notwithstanding the failure of an appearance by the appellee. Appellant's motion is denied.

As we view the appellant's contention, she asserts that this court should, in effect, determine that child-support payments made by the defendant to her directly should not be credited to the defendant for the sole reason that he did not make said payments to the Clerk of the Circuit Court of Vermilion County as provided in the original decree. The payments should have been made to the Clerk as the decree provided. The fact that they were made directly rather than through the Clerk does not constitute a delinquency in payment for that reason alone. The important fact is that the

petitioner did receive the payments, although directly rather than through the Clerk. There is no suggestion from this record that the defendant persistently and contemptuously refused to make the payments through the office of the Clerk of the court.

The judgment of the Circuit Court of Vermilion County was in accord with the evidence presented, and that judgment is affirmed.

Judgment affirmed.

SMITH and TRAPP, JJ., concur.

NO. 69-139 ~~118 I.A.~~ 2nd 231 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BONNIE ROTTER, Plaintiff-Appellee, vs. ROY ROTTER, Defendant-Appellant.	)	Appeal from the Circuit Court of DuPage County, Illinois

MR. JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order vacating a former order awarding the custody of children to the defendant and an order denying a petition for change of venue.

The defendant-appellant has filed the record, his brief and excerpts from the record. No appearance or brief has been filed by the plaintiff-appellee.

> "When the appellant has perfected his appeal, but the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal." Erikson v. Woodall, ____ Ill. App. 2d____; 252 NE 2d 697 (1969).

The judgment order of June 3, 1969, vacating the order of May 29, 1969, is reversed. The order of July 1, 1969, denying the petition for a change of venue is reversed and remanded with directions to grant said petition, all as prayed for by the defendant-appellant herein.

ORDER of May 29, 1969 - REVERSED
ORDER of July 1, 1969 - REVERSED
and REMANDED WITH DIRECTIONS

Davis, P.J. and Abrahamson, J. - Concur

119 I.A. 2nd 237

No. 69 207 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

R. M. MOTT, E. D. MOTT, and J. H. MOTT, Assigneesof Mott Land Corporation,	)	
Plaintiffs-Appellants,	)	
v.	)	Appeal from the Circuit Court of Winnebago County
THE PATTEN COMPANY, an Illinois corporation,	)	
Defendant-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

Plaintiffs-lessees, R. M. Mott, E. D. Mott, and J. H. Mott, as assignees of Mott Land Corporation, filed a complaint in the Circuit Court of Winnebago County for declaratory judgment that Article XV of a lease entered into with defendant-lessor, The Patten Company, is void. The complaint alleged that agreement of the plaintiffs to assume the obligations of the predecessors in title was procured by defendant through threat of forfeiture of the leasehold and without any consideration whatsoever; and that Section XV of the lease restricts each of the plaintiffs from alienating his real property in the leasehold by requiring the successor in privity of estate to assume by written contract to be personally bound by the provisions of the lease.

The defendant, The Patten Company, filed an amended motion to dismiss the complaint on the grounds that it contained insufficient allegations of fact to justify the relief prayed for in the complaint, which

was granted by the trial court.

The Patten Company owns land in downtown Rockford. In 1948 its assignors, Seth B. and Helen Mae Atwood, husband and wife, entered into a 99-year lease as lessors with Max and Leona Liebling, husband and wife, as lessees. Article XV of the lease reads as follows:

> "The lessee shall have the right to assign their interest in this lease provided that:
> (a) The lessees at the time of such assignment are not in default under this lease;
> (b) The assignee shall in writing assume and agree to perform all of the terms, covenants and conditions thereof on the part of the lessee to be performed;
> (c) A duplicate original of such assignment and assumption, duly executed, shall be delivered to lessor.
> (d) No assignment shall be valid against the Lessor unless conditions (a), (b), and (c) and each of them, have been complied with; but upon compliance therewith the assignor shall be released from any further liability under this lease, excepting that the original lessee hereunder and the first assignor shall not be released from any further liability, but shall remain liable under the terms of said lease along with their assignee or any subsequent assignee, for the payment of rent and the due performance of all the terms, covenants and conditions therein contained * * * ."

Provision is also made, in Article XI of the lease, for termination procedures that may be followed by lessor in the event that lessee fails to perform the covenants and agreements of the lease.

In 1955 the Lieblings, with the consent of the lessors, assigned the lease to Mott Land Corporation, which agreed to perform all the terms, conditions and covenants of the lease. The Atwoods thereafter conveyed the reversion to the defendant, The Patten Company. On August 22, 1966, Mott Land Corporation, with the permission of The Patten Company, assigned all of its right, title and interest in and to the leasehold to the plaintiffs, R. M.

Mott, E. D. Mott, and J. H. Mott, and they agreed to assume the lease as follows:

> "The parties of the second part, R. M. Mott, E. D. Mott and J. H. Mott, the assignees herein, hereby expressly accept this assignment and assume and agree to perform all of the terms, covenants and conditions of said lease on the part of the lessee, or assigns, to be performed under the terms of said lease for the balance of the period thereof."

The sole issue in this case is the validity of the requirement in Article XV of the lease that the assignee must assume the obligations of the lease under the facts alleged in the complaint.

The plaintiffs have cited Illinois cases beginning with Imperial Build. Co. v. Board of Trade, 238 Ill. 100, 107, as declaring the law to be that a leasehold interest in land is for some purposes treated as personal property but generally it is considered a chattel real, and that since a leasehold is considered a chattel real, there can be no restraint on the lessees' right of alienation of property. The defendant does not disagree but states that Article XV of the lease does not contain a restriction on the right of alienation of property. Defendant points out that there is no case in Illinois that holds that a condition requiring an assumption by the assignee of a lease before consent will be given by the lessor is invalid, and we have found none. In 1894 it was held in Kew v. Trainor, 150 Ill. 150, at p. 156:

> "Where a lease contains no provision forbidding the lessee from assigning the lease, he may, if he so desires, transfer the lease without consent of the landlord; but at the same time it may be regarded as well settled that the lessor, by the contract of letting, may reserve to himself the right to look for the payment of his rent and the preservation of his property to the person to whom he leased, rather than to be compelled to rely on any reckless, irresponsible person that his tenant may see proper to shift upon him."

The court, in the Imperial Build. Co. case, supra, further held that the lessor had a right of re-entry for violation of the lease provisions. Apparently, the last Illinois case dealing with a restraint on alienation as applied to a leasehold interest is Assoc., Cotton Shops v. Evergreen Pk. Shopping, 27 Ill. App. 2d 467 (1960). There the lease provided in Article 24 that, if there was a change in control of the lessee corporation, the landlord could terminate the lease and term at any time after such change in control by giving the tenant 60 days' written notice of termination. The court there held that such a provision was a condition subsequent and not a provision for forfeiture and further held on pp. 473, 474 and 475:

> "The plaintiff first contends that Article 24 of the lease should be held void as a matter of public policy since it constitutes a restraint on the right of alienation of property. This is a case of first impression in this State. Nor have we found any cases elsewhere construing such a clause.
>
> "A provision in a lease which prohibits the lessee from subletting the premises or assigning the lease is valid, and by the terms of the lease a violation thereof may terminate the leasehold. * * *
>
> "*****In the case at bar all of the capital stock of the lessee was sold to another corporation. Under the provisions of the lease the lessor, the defendant here, then had the right, by giving sixty days' notice to the lessee at any time after such transfer, to terminate the lease. This was not a provision for a forfeiture. It was a clause in the leasepermitting the lessor, upon the happening of a designated event, to terminate the leasehold upon complying with the notice provisions therein set forth. Such a provision is a condition subsequent. In Restatement of the Law of Property, sec. 24, it is stated:
>
> > 'The term "condition subsequent" denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor

> in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.'
>
> In the case of a limitation the term is limited to the time of the happening of the contingency and when the contingency happens the estate is terminated as if the term had expired. * * * While in many cases it is very difficult to distinguish between a limitation and a condition subsequent, it would seem that the term 'forfeiture' should not be used in connection with contracts incorporating a condition subsequent."

The court also noted in that case that the corporate lessee signed the lease with full knowledge of the fact that the clause in question was contained therein, and stated that it must be bound by the provisions of the clause.

Here, the assignees of the lease took with notice of the terms and conditions of the lease and expressly assumed the obligations of the lease. It is, therefore, apparent that the plaintiffs, having been assigned the lease and assumed the benefits thereof, are now trying to avoid the burdens of the lease. This they cannot do under the circumstances here present. Article XV of the lease in dispute creates a condition subsequent in the lease, just as the change in control provision in the Assoc. Cotton Shops case created a condition subsequent, and said provision is not a forfeiture provision.

Plaintiffs also state that the general rule is that if there is a repugnancy between the granting clause and the habendum in a deed, the former will prevail. Defendant contends that this rule does not apply to leases. In Cohn v. Armstrong Tire and Vulcanizing Co., 222 Ill. App. 572, it is stated at P. 577:

> "The general rule that if there be repugnancy between the granting clause and the habendum in a deed, the former will prevail, is not applicable here, and cases applying this rule to the

> ordinary deeds of conveyance are not in point. Here the two clauses of the lease alleged to be repugnant should be construed together, and we then have the ordinary and frequest demise of premises for a certain term conditioned upon the right of the lessor to cancel before the expiration of the term upon giving the required notice. We are referred to no case holding such a reservation in a lease invalid."

It is, therefore, our opinion that this contention of the plaintiff is without merit.

Finally, it is contended that the contract of assumption signed by the plaintiffs was secured by threats of enforcing illegal covenants of the lease, and that the defendant paid no consideration therefor. We have previously stated that the assumption provision contained in Article XV of the lease was not illegal. It is clear that consideration for the assumption agreement was the assignment of the lease and the receipt by the plaintiffs of the benefits of the lease.

The judgment of the Circuit Court of Winnebago County is affirmed.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, J. J. concur.

119 I.A. 2nd 461
NO. 69-93

In The

APPELLATE COURT OF ILLINOIS

Third District

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee, vs. HENRY O. SIMMONS, Defendant-Appellant	Appeal to the Appellate Court, State of Illinois, Third District, From the Circuit Court of Knox County, Illinois Honorable Daniel J. Roberts, Judge Presiding

RYAN, J.

Abstract

The defendant was charged in two informations with the offenses of deceptive practice and obstructing justice. He appeared before the court without an attorney. The record indicates a considerable amount of confusion existed in the mind of defendant concerning his right to an attorney, his right to be released on bond and the procedure to be followed in the determination of the issues. The court admonished the defendant as to his rights in each case. During the court proceeding defendant indicated he wanted to plead guilty to the charges. The court thereupon admonished him of the consequences of his plea of guilty in each case and accepted the pleas. The defendant made application for probation and the matter was referred to the probation officer for investigation.

When the court reconvened the contents of the probation officer's report were discussed and the defendant made statements concerning the same. The court denied the application for probation and asked the States Attorney for a recommendation which he gave to the court as follows: "I would respectfully recommend that Mr. Simmons be committed to the State Farm at Vandalia for three months on deceptive practice charge and I am not sure about the obstructing justice." In his statement to the court, the States Attorney also said, "But this obstructing justice is a more serious thing than deceptive practice."

Following the hearing the court sentenced the defendant to the State Farm in Vandalia for a period of one year on each charge and specified that the sentences should run consecutively. The defendant was not represented by counsel in either case at any stage of the proceedings.

On appeal to this court the defendant has raised several issues involving the validity of the proceedings and the appropriateness of the sentence. However, since the defendant was sentenced on August 20, 1968, and has now served more than 17 months of the sentence imposed, the defendant in his brief has indicated that he would prefer that this court not send the case back to the trial court for further hearings, but that we exercise authority granted us under Supreme Court Rule No. 615(b)(4)(Ill. Rev. Stats., Chap. 110(A), Sec. 615(b)(4)) and reduce the defendant's sentence.

The States Attorney has filed no brief on behalf of the people nor has he opposed in any manner the request of the defendant.

We stand firmly by the rule that recommendations of the States Attorney as to punishment are not binding on the court. 15 I.L.P. Criminal Law, Sec. 814 However, in this case the record indicates that the defendant was considerably confused. He was not represented by counsel. The record does not reflect that the defendant knew or was admonished that a recommendation of the States Attorney was not binding on the court. Under these circumstances, we believe that justice would have best been served if the court would have accepted the recommendation of the States Attorney as to the penalty for the deceptive practice charge. This recommendation was a sentence of three months at the State Farm at Vandalia. Accordingly, the sentence of the defendant in information No. 68-CR-317 in the Circuit Court of Knox County charging the defendant with deceptive practice is hereby reduced to three months' confinement at the State Farm at Vandalia.

The States Attorney made no recommendation as to the sentence on the charge of obstructing justice other than to state that he considered this charge to be "more serious." We, therefore, will not disturb the sentence for this offense nor the determination by the court that the sentences shall run consecutively.

The judgment of the Circuit Court of Knox County will be modified as herein set forth and as modified will be affirmed.

The defendant having served the full period of time under the sentences as modified by this court is entitled to his immediate release from confinement under these sentences.

JUDGMENT MODIFIED AND AFFIRMED AS MODIFIED.

STOUDER, P.J. concurs.

ALLOY, J. concurs.